No. 02-1124

Supreme Court, U.S.
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In The
Supreme Court of the United States

JULIANNE M. BOWLER, in her official capacity as COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS and PERMANENT RECEIVER OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN MUTUAL INSURANCE COMPANY,

Petitioner,

v.

UNITED STATES and JOHN ASHCROFT, in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE CLAIMS BAR DATE ISSUE IS ONE OF NATIONAL IMPORTANCE IMPACTING ALL STATES 5

A. The States And Their Insurance Claimants Are Impacted 5

B. The States Are Impacted Through The Loss Or Delay In Revenue Through Premium Tax Offsets 9

C. The States Are Impacted Through The Incentive Provided The United States To Withhold Releases Until Accruals Allow For Distributions On Lower Priority Claims Of The United States 10

D. The States Are Likely To Be Impacted To A Greater Extent In The Future As More Claims By The United States In Insurer Receiverships Are Brought About Through Recent Enactments 11

II. THE APPLICATION OF BAR DATES TO THE UNITED STATES IS AN IMPORTANT AND RECURRING QUESTION THAT SHOULD BE SETTLED BY THIS COURT 13

III. THE COURT OF APPEALS MISAPPLIED THE STANDARDS AND PRINCIPLES OF *FABE* AND THE PLAIN WORDING OF THE MCCARRAN-FERGUSON ACT 16

TABLE OF CONTENTS – Continued

Page

IV. THE STANDARDS AND PRINCIPLES SET OUT IN *FABE* NOW REQUIRE CLARIFICATION 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Clark v. Willard, 292 U.S. 112 (1934) 2, 17

Garcia v. Island Program Designer, Inc., 4 F.3d 57 (1st Cir. 1993) ..... *passim*

Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979) 3

Relfe v. Rundle, 103 U.S. 222 (1881) 2, 17

Ruthhardt v. United States, 303 F.3d 375 (1st Cir. 2002) 5

Ruthhardt v. United States, 164 F. Supp. 2d 232 (D. Mass. 2001) 7

SEC v. Nat'l Securities, Inc., 393 U.S. 453 (1969) 14

State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc., 510 S.E.2d 764 (W. Va. 1998) 14

United States Dept. of Treasury v. Fabe, 508 U.S. 491 (1993) ..... *passim*

STATUTES

Federal Priority Act, 31 U.S.C. § 3713(b) (2000) 2, 7, 15, 18

Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999) 11, 12

Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 101, 113 Stat. 1338, 1341 (Nov. 12, 1999) 12

Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 103, 113 Stat. 1338, 1342-1351 (Nov. 12, 1999) 11, 12

Gramm-Leach-Bliley Act, 15 U.S.C. § 6711 (Supp. 2001) 12

TABLE OF AUTHORITIES – Continued

Page

Mass. Gen. L. ch. 175, § 180F (2000) 10

Mass. Gen. L. ch. 175D, § 5(1)(c) (2000) 9

Mass. Stat., ch. 124, § 8 (1855) 17

McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq. (West 1997) ..... *passim*

Terrorism Risk Insurance Act of 2002, Pub. Law 107-297, 116 Stat. 2322 (Nov. 26, 2002) 12

Wisconsin Insurers Rehabilitation and Liquidation Act, Wis. Stat. § 645 (1968) 17

MISCELLANEOUS

1 Couch on Insurance, § 5:37 (3d ed. 1995) 2

1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 18, 25, 123, 179 (1871) 18

1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 23-58 (1945) 3

1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 29 (1936) 17

1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 168, 241, 271 (1969) 17

90 Cong.Rec. A4403-4408 (1944) 3

91 Cong.Rec. 483 (1945) (remarks of Sen. O'Mahoney) 3

91 Cong.Rec. 1487 (1945) (statement of Sen. Ferguson) 15

Bylaws of the National Association of Insurance Commissioners (1999), *at* http://www.naic.org/1consumer_protection/htm_files/NAIC_certificate_bylaws.htm (last visited February 24, 2003) 1

TABLE OF AUTHORITIES – Continued

Page

Contact List For Insurers In Receivership (Aug. 2002), *at* http://www.naic.org/receivership (last visited Feb. 24, 2003) 8

Insurers Rehabilitation and Liquidation Model Act, 3 NAIC Model Laws, Regulations and Guidelines, 555-1 to 555-62 (2003) 3

NAIC Contact List for Insurers in Receivership (Aug. 2002), *at* http://www.naic.org/receivership (last visited Feb. 24, 2003) 8

NAIC Financial Regulation Standards and Accreditation Program (2000), *at* http://www.naic.org/1regulator/docs/frsa12-02.doc (last visited February 24, 2003) 2

NAIC List Regarding General Contacts And Related Web Pages, *at* http://www.naic.org/receivership/documents/StateReceivershipGeneralContact_1-7-3.xls (last visited Feb. 24, 2003) 8

NAIC Report on Receiverships (1999) 8

National Conference of Insurance Guaranty Funds – 2002 Summary of Property & Casualty Insurance Guaranty Association – Acts of the Various States and US Territories – Summary by Provision (2002), at http://www.ncigf.org/ (last visited Feb. 24, 2003) 10

NOLHGA – State Laws & Provisions Report – Tax Offsets (Dec. 20, 2002), at http://www.nolhga.com/stateinformation/main.cfm (last visited February 24, 2003) 10

TABLE OF AUTHORITIES – Continued

Page

Supreme Court Rule 10(b) 16

Supreme Court Rule 37.1 4

Supreme Court Rule 37.3 1

Supreme Court Rule 37.6 1

Uniform Insurance Liquidation Act, 13 U.L.A. 321 (Master ed. 1986) 17

INTEREST OF THE AMICUS CURIAE

The amicus curiae, the National Association of Insurance Commissioners ("NAIC"),[1] is a non-profit corporation whose membership consists of the chief insurance regulatory officials of each state, the four territories, and the District of Columbia. Created in 1871, it is the nation's oldest association of state government officials.

Only a member may cause the NAIC's filing an amicus curiae brief and such requires approval of the Executive Committee of the NAIC, which is made up of at least 15 of the NAIC's 50-plus members. *See* Bylaws of the National Association of Insurance Commissioners (1999) *at* http://www.naic.org/1consumerprotection/htm_files/NAIC_certificate_bylaws.htm (last visited Feb. 24, 2003). The mission of the NAIC as set out in its Certificate of Incorporation is

> [t]o assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals: (a) protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers; (b) promote, in the public interest, the reliability, solvency, and financial solidity of insurance institutions; and (c) support and improve state regulation of insurance.

Id..

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[1] Pursuant to Supreme Court Rule 37.3, letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, this brief was authored in whole by undersigned counsel for the NAIC. No person, other than the amicus curiae made a monetary contribution to the preparation or submission of the brief.

The members promote the reliability of claim payments in their two different capacities as (a) the chief insurance regulators in each state and (b) as the officer of each state charged with handling insurer receiverships for that state.[2] Furthermore, relating to the central issue in this case, these members – or more properly their states – may be exposed to liability should they be deemed to be violating the Federal Priority Act, 31 U.S.C. § 3713(b) (2000).

"A system of effective solvency regulation provides crucial safeguards for America's insurance consumers [by requiring] that regulators have adequate statutory and administrative authority to regulate an insurer's corporate and financial affairs." NAIC Financial Regulation Standards and Accreditation Program (2000), at http://www.naic.org/regulator/docs/frsa12-02.doc (last visited Feb. 24, 2003).

For a state to be accredited by the NAIC its "[s]tate law should set forth a receivership scheme for the administration, by the insurance commissioner, of insurance companies found to be insolvent as set forth in the NAIC's Insurers Rehabilitation and Liquidation Model Act." *Id.*

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[2] *See Relfe v. Rundle*, 103 U.S. 222 (1881) (insurance receiver is officer of the state representing it while performing its public duties in winding up affairs of one of its insolvent insurers, with authority, not from the decree of the court, but from the statute); *Clark v. Willard*, 292 U.S. 112 (1934) (official liquidator is the successor to the corporation, not a mere receiver, and based on succession established for the corporation by the law of its creation). *See also* 1 Couch on Insurance, § 5:37 (3d ed. 1995); and Br. for Pet'r at 9 and Br. for Pet'r App. at 55a. States take over insolvent insurers in the same manner as the United States takes over failed banks. *See* Br. for Pet'r at 20.

To provide a comprehensive regulatory framework for insurer receiverships, the NAIC has promulgated several versions of the Insurers Rehabilitation and Liquidation Model Act (Model Act) over many years. *See* 3 NAIC Model Laws, Regulations and Guidelines (Model Laws) 555-1 to 555-62 (2003). Every state has, at some point, adopted the Model Act in effect at that time. *See* 3 Model Laws 555-63 to 555-67. The priority and claims bar date provisions in the Model Act are the provisions, as adopted in Massachusetts, which are at issue in this matter.[3]

This case is the latest in a series of cases in which the United States has asserted either or both (a) that federal claims should be paid before the claims of guaranty funds (prior to *United States Dept. of Treasury v. Fabe*, 508 U.S. 491 (1993), the United States asserted this position regarding all non-federal claims including administrative and insurance policy related claims), and (b) that federal claims are not subject to claim bar dates established by a state's statutory receiver and court in accordance with state statutes governing insurer receiverships. The NAIC

[3] In addition to the Model Act, the NAIC also played a role in the adoption of the other statute at issue in this matter, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq. (West 1997). The passage of the McCarran-Ferguson Act was preceded by the introduction in the Senate Committee of a report and a bill submitted by the [NAIC] on November 16, 1944. 90 Cong. Rec. A4403-4408 (1944). The views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill. 91 Cong.Rec. 483 (1945) (remarks of Sen. O'Mahoney). *See Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979). *See also* 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 23-58 (1945).

has filed amicus briefs in most of these cases that have reached the appellate courts.

SUMMARY OF ARGUMENT

This Court should grant the petitions[4] for certiorari and consider the claims bar date issue because (a) it is an issue of national importance impacting all states; (b) the reasons set out by both of the petitioners[5] as to (1) there being an important question of federal law that should be settled by this Court; (2) the conflicts and inconsistencies with the decisions of other state and federal courts; and (3) the misapplication of the standards and principles set out in *Fabe*; and (c) this Court set out standards and principles in *Fabe* that, due to conflicting interpretations of *Fabe* in state and federal courts, now require clarification.

[4] The Alabama Insurance Guaranty Association, et al., ("Petitioning State Guaranty Associations" or "Petitioning SGAs") also have submitted a Petition for Writ of Certiorari in this matter. (02-1135) The NAIC also supports the granting of the Petition of the Petitioning SGAs for the same reasons as are stated here.

[5] Pursuant to Supreme Court Rule 37.1, the NAIC will only supplement with relevant material not already brought to the Court's attention.

ARGUMENT

I. THE CLAIMS BAR DATE ISSUE IS ONE OF NATIONAL IMPORTANCE IMPACTING ALL STATES

The decision of the United States Court of Appeals for the First Circuit, *Ruthhardt v. United States*, 303 F.3d 375 (1st Cir. 2002), that the claim bar dates for insurer insolvencies do not apply to the United States will impact the states in several ways. These impacts are described below ranging from the more apparent and immediate impact on claimants in the states to the impact on the states' revenues through premium tax offset provisions. Another impact covered concerns the less apparent effect the decision by the Court of Appeals has – in combination with the absolute priority rule – to give the United States an incentive to delay releases to an insurer receivership until the estate accrues to the point that distributions can be made to the lower priority classes in which the United States is likely to have general claims. In other words, the holding by the Court of Appeals regarding claims bar dates provides an opportunity for the United States to circumvent the priority of distribution. Last, the prospect of increases in federal claims is covered.

A. The States And Their Insurance Claimants Are Impacted

The Court of Appeals conclusion regarding claim bar dates means that a federal claim can be filed at any time for any amount on any basis. Because this position is likely to be advanced by the United States in any state, an enormous risk would be assumed by any states as

receivers in making any distributions other than to the United States.

The NAIC's member states have been informed of this risk and many have indicated that they will delay paying distributions to any claimants in their insurer receiverships. Doing so is the only way for these states to ensure enough funds to pay a federal claim that may be made at *any* time. The result of this is nationally important because almost every state in the country may have to withhold payments to policyholders and other claimants until this matter is settled. A nationwide moratorium on claim payments is contrary to both the very concept of insurance and one of the primary purposes of insurance regulation. *Fabe* recognized this principle, noting that "[t]he primary purpose of a statute that distributes the insolvent insurer's assets to policyholders in preference to other creditors is identical to the primary purpose of the insurance company itself: the payment of claims made against policies." 508 U.S. at 505-06.

The holding in *Fabe* that a state may give a higher priority to policy-related claims (commonly referred to as "policyholder claims" even though most state statutes classify claims in this priority class by the type of claim[6] as opposed to the type of claimant) over claims of the United States is rendered useless because of the holding by the Court of Appeals. Only with claim bar dates that are

[6] *See* NAIC Insurer Rehabilitation and Liquidation Model Act (Model Act) § 47C (All claims under policies including claims of the federal and any state or local government for losses incurred, ("loss claims") including third party claims.) 3 NAIC Model Laws at 555-53 (Note reference is to page 53 of Model 555).

enforceable as to all claimants, including the United States, can a state as receiver pay any claims without fear of violating the Federal Priority Act. This is so because a federal claim can be filed at any time for any amount as (a) a policy-related claim (which would be in the highest priority of claims, after administrative costs), or (b) a general claim (in a lower priority under most state statutes), against an insolvent insurer's estate. If a state as receiver uses all of the estate's assets to pay claims under policies and, after that, the United States files a policy-related claim, then the state as receiver could be liable, pursuant to the Federal Priority Act, 31 U.S.C. § 3713(b).

If it were not possible for the United States to have policy-related claims, then there would be less of a problem created by the decision by the Court of Appeals that the United States can file its claims at any time. In insurer receiverships that only have enough assets to pay the claims in the policy-related claims priority class, *Fabe* would then operate to bar the claims of the United States in the lower priority classes. However, as the United States District Court for the District of Massachusetts, in *Ruthardt v. United States*, 164 F. Supp. 2d 232 (D. Mass. 2001) noted, the opinion in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993), which the Court of Appeals followed in this case, "seems to have been insufficiently sensitive to the fact that late-filed federal [policy-related] claims may substantively, and rather directly, interfere with the timely and orderly distribution of funds

to general policyholder creditors." Br. for Pet'r App. at 40a.[7]

The practical effect of the decision by the Court of Appeals regarding the claims bar date issue is that claimants in hundreds of insurer receiverships will not be paid distributions that would otherwise have been made. *See* NAIC, 2002 Contact List For Insurers In Receivership (Aug. 2002) and Contact List For Insurers In Receivership (Aug. 2002), *both at* http://www.naic.org/receivership/ (last visited Feb. 24, 2003). It is likely that claims worth several billions of dollars in the aggregate will go unpaid until this issue is resolved. *See* NAIC List Regarding General Contacts And Related Web Pages *at* http://www.naic.org/receivership/documents/StateReceivershipGeneralContact1-7-3.xls (last visited Feb. 24, 2003).[8] *See also* NAIC Report on Receiverships (1999) (Publication containing summary information on receiverships including amounts claimed in each receivership estate by state in most instances). Further, a state may have no ongoing domestic receiverships and still have many claimants with claims against insurer receivership estates that were domiciled in other states. Thus, every state is likely to have many claimants impacted by the hold on payments resulting from the decision by the Court of Appeals.

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[7] Citations in the form Br. for Pet'r App. are to the Appendix for the Massachusetts Petition for Writ of Certiorari. Citations in the form Br. for Pet'r SGA App. are to the Appendix for the Petition for Writ of Certiorari by the Petitioning SGAs.

[8] There are links at this Web page to specific state Web pages that list receiverships or provide information on particularly significant receiverships.

It is not only a delay in payment that will be caused, but also a decrease in the amount paid at distribution. The reduction results from these insurer receivership estates having to be open longer, which increases administrative expenses, as well as the additional expenses related to litigating these issues with the United States. Every dollar of administrative expenses is a dollar that cannot be paid out in distributions.

B. The States Are Impacted Through The Loss Or Delay In Revenue Through Premium Tax Offsets

This decision by the Court of Appeals will have an impact on the revenues of many states in decreased or delayed premium tax collections through increased premium tax offsets. Delays in distributions to state guaranty associations increase the net assessments made by the associations on their member insurers. *See, e.g.*, Mass. Gen. L. Ch. 175D, § 5(1)(c) (2000). Distributions made to the state guaranty associations either (a) get returned to the insurers originally assessed to cover the costs of a past insurer insolvency, or (b) are used to decrease the amount currently being assessed on member insurers to cover the costs of current insurer insolvencies. In either event, such distributions decrease the net amount that member insurers pay in assessments. This, in turn, decreases the amount of premium tax offset taken in those states that provide for a premium tax offset. A premium tax offset allows an insurer to reduce the premium taxes it would otherwise pay to the state by offsetting (usually over a

period of five years) the guaranty association assessments it has paid in prior years.[9]

In this area of impact also, it is not only a delay in payment, but also a decrease in the amount paid at distribution that will result from these insurer receivership estates having to be open longer with increased administrative and litigation expenses.

C. The States Are Impacted Through The Incentive Provided The United States To Withhold Releases Until Accruals Allow For Distributions On Lower Priority Claims Of The United States

The "absolute priority rule" provides, "[e]very claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment." 3 Model Laws at 555-63 (Model Act § 47), *see also*, Mass. Gen. L. Ch. 175, § 180F (2000); Br. for Pet'r App. at 58a. Insurer receivership estates generally have invested assets that generate income to the estate. If no distributions are made to claimants, then this income accrues on all of the assets remaining in the estate. Eventually, the assets of the estate increase to the point

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[9] A summary of these provisions for property and casualty insurers is provided in the National Conference of Insurance Guaranty Funds – 2002 Summary of Property & Casualty Insurance Guaranty Association – Acts of the Various States and US Territories – Summary by Provision (2002), *at* http://www.ncigf.org/ (last visited Feb. 24, 2003). A summary of these provisions for life and health insurers is provided in the publication NOLHGA – State Laws & Provisions Report – Tax Offsets (Dec. 20, 2002), *at* http://www.nolhga.com/stateinformation/main.cfm (last visited Feb. 24, 2003).

that the claims in the higher priority classes can be paid in full such that, in accordance with the absolute priority rule, claims in lower priority classes can then be paid at least partially. The Court of Appeals holding regarding claim bar dates gives the United States the ability to cause or prevent all distributions from insurer receivership estates, by giving or withholding releases. If the United States has claims in the lower priority classes, which is likely, then the United States has an incentive to withhold releases as to its claims against the estate. This is not to say that this is currently being done or is even currently a factor in any particular matter. It is enough that the incentive to do this is created by the decision by the Court of Appeals that clarification by this Court is now required.

It should not be viewed that this incentive to withhold releases and cause full payment of higher priority claims alleviates the increased administrative and litigation expenses being incurred as a result of this decision by the Court of Appeals. The reality is that the higher priority claimants, all of which, generally, will be in the policy-related claim priority class, are still incurring these expenses, but are doing so indirectly in the form of interest free loans to the estate in the amount of what would be their timely paid claims.

D. The States Are Likely To Be Impacted To A Greater Extent In The Future As More Claims By The United States In Insurer Receiverships Are Brought About Through Recent Enactments

The implications of the Gramm-Leach-Bliley Act (GLBA), Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999), further illustrate the importance for the Court to

resolve the issues at the center of this dispute. In repealing Depression-era restrictions, GLBA permits affiliations among insurers, depository institutions, and securities firms.[10]

By permitting insurers, depository institutions, and securities firms to affiliate through a financial holding company structure,[11] GLBA clearly envisions the formation of financial services conglomerates. Because the insurance activities of "any person . . . shall be functionally regulated by the states," 15 U.S.C. § 6711 (Supp. 2001) insurers and other entities engaging in the business of insurance will remain subject to state regulation, including state solvency regulation. Because of the expectation through GLBA of increased affiliations among insurers and other financial services providers – many of which, depository institutions particularly, are subject to federal regulation – there exists an increased likelihood that through these affiliations, insurers may be subject to an increased frequency of federal claims against a receivership estate in the event of an insurer insolvency.

The recently enacted Terrorism Risk Insurance Act of 2002 (TRIA), Pub. Law 107-297, 116 Stat. 2322 (Nov. 26, 2002), also portends of an increased number of federal claims against insolvent insurance companies. The Terrorism Insurance Program established by TRIA provides that the federal government will pay a share of losses in the

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[10] *See* Gramm-Leach-Bliley Act (GLBA), Pub. L. No. 106-102, § 101, 113 Stat. 1338, 1341 (Nov. 12, 1999).

[11] *See* GLBA, Pub. L. No. 106-102, § 103, 113 Stat. 1338, 1342-1351 (Nov. 12, 1999).

event of a defined "act of terrorism" where insured losses exceed certain thresholds noted within the act. Sections 103(e)(7) and 103(e)(8) include provisions indicating conditions under which federal assistance to insurers shall be subject to a mandatory recoupment through premium surcharges on insurance policies. 116 Stat. at 2329-2330. Of particular relevance to the issues at hand, the recoupment program raises the specter of federal claims against a receivership estate for federal assistance received for terrorism-related losses by insurance companies. Therefore, TRIA further demonstrates the need for the Court to resolve these issues. The trends clearly favor more federal claims against insurer receivership estates, not less.

II. THE APPLICATION OF BAR DATES TO THE UNITED STATES IS AN IMPORTANT AND RECURRING QUESTION THAT SHOULD BE SETTLED BY THIS COURT

While Petitioners' explain how the decision by the Court of Appeals will impact insurer receivers and claimants in all states and is therefore of compelling national interest (and the NAIC supplements that explanation), it should be added that these are questions that should be settled by this Court because the issues arise not from the plain wording of the statutes at issue, but from the way in which those statutes have been construed by the Court of Appeals in *Garcia* and in this case.

Garcia did not follow *Fabe* (which was based on the plain wording of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (West 1997)), but rather followed the narrower judicially created insured-insurer test: "statutes aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly, are laws

regulating the 'business of insurance' within the meaning of the phrase." *SEC v. Nat'l Securities, Inc.*, 393 U.S. 453, 460 (1969).

Also, with regard to the claims bar date issue, "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Supreme Court Rule 10(b). The state court of last resort with which the Court of Appeals decision conflicts in this instance is the Supreme Court of West Virginia, which in regard to this important federal question has held that:

> [subordinating late filed claims to a lower priority class in the priority of claims] sufficiently protects policyholders so that, under the McCarran-Ferguson Act, it reverse preempts the federal priority statute found at *31 U.S.C. § 3713.* Accordingly, for the foregoing reasons, we hold that *W. Va. Code § 33-24-27 (1996)* (Supp. 1998), which specifies the order of distribution for claims against the liquidated estate of certain insolvent insurance companies [and subordinates late-filed claims], is a law that was enacted for the purpose of regulating the business of insurance in that it operates to protect the claims of policyholders.

State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc., 510 S.E.2d 764, 785-86 (W. Va. 1998). This directly conflicts with the holding of the Court of Appeals in this matter. Br. for Pet'r App. at 14a-18a. It also conflicts with the holding in *Garcia* that a Puerto Rico bar date was preempted by the Federal Priority Act despite the McCarran-Ferguson Act because the bar date was "neither directed at, nor necessary for, the protection of policyholders. . . . The provision helps policyholders only to

the extent that (and in the same way as) it helps all creditors." *Garcia*, 4 F.3d at 62.

The Court of Appeals at several points incorrectly concluded that only Congress could address this issue of claims bar dates not applying to the United States. First, it noted, "it may be useful to Congress for us to explain why the policy ought to be reconsidered." Br. for Pet'r App. at 17a. This followed its statement that "giving the United States an open-ended exemption from deadlines [bar dates] is (in the liquidation context) simply terrible public policy." Br. for Pet'r App. at 16a. The Court of Appeals appears to have ignored the possibility that this "terrible policy" may be the result of judicial interpretations. Second, after noting "some uniform limit is clearly needed," it concluded that "Congress could easily fix the problem, as it had already done for ordinary bankruptcies. (citations omitted) But this is a matter for the legislature, not the courts." Br. for Pet'r App. at 17a. This ignored the more likely prospect that Congress will take the view that it has already "fixed the problem" by enacting McCarran-Ferguson.[12] It also ignores that this Court can reverse the

[12] Regarding the purpose of the McCarran-Ferguson Act the legislative history has the following: "What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books [as was the Federal Priority Act] relating in some way to interstate commerce, it would not apply to insurance. We wanted to be sure that the Congress, in its wisdom, would act specifically with reference to insurance in enacting the law." (statement of Sen. Ferguson). 91 Cong. Rec. 1487 (1945). To that was added, "no existing law and no future law should, by mere implication, be applied to the business of insurance." (statement of Sen. O'Mahoney). *Id. See also Fabe,* 508 U.S. at 507 n.7.

decision by the Court of Appeals in this case and can overrule *Garcia* and its misapplication of *Fabe* and misinterpretation of McCarran-Ferguson. Third, the Court of Appeals concluded by admonishing, "If the Department of Justice cannot find the time to draft a proper amendment, it will simply encourage judicial self-help, however misguided that may be." Br. for Pet'r App. at 18a. The Department of Justice does not need to draft an amendment; rather, this Court should recognize that this "terrible policy" arises from judicial interpretations and not from the plain wording of McCarran-Ferguson as was followed in *Fabe*.

III. THE COURT OF APPEALS MISAPPLIED THE STANDARDS AND PRINCIPLES OF *FABE* AND THE PLAIN WORDING OF THE MCCARRAN-FERGUSON ACT

The Court of Appeals correctly declared that, "Prior to *Fabe*, the touchstone of McCarran-Ferguson protection was the insurer-insured contract." Br. for Pet'r App. at 10a. It also correctly interpreted *Fabe* to mean provisions "that indirectly assure that policyholders get what they were promised can also trigger McCarran-Ferguson protection; the question is one of degree, not of kind." Br. for Pet'r App. at 10a-11a. But, in regard to bar date provisions it ignored this and the holding in *Fabe* that provisions "reasonably necessary to further the goal of protecting policyholders," *Fabe*, 508 U.S. at 508-09 also trigger this protection.

Both Petitioners adequately point out that this broader post-*Fabe* test has been applied in other United States Circuit Courts in the insolvency context, but was ignored by the Court of Appeals in this case in regard to

the claims bar date exemption it granted to the United States. Br. for Pet'r at 21-29, Br. for Pet'r SGA at 7-14. The SGA Petitioners add that this broader interpretation of laws that are for the "purpose of regulating the business of insurance" has also been applied by this Court, outside of the insolvency context. Br. for Pet'r SGA at 14-16.

Regarding the argument that "[p]lenary review is further supported by the significant impact of the ruling below on federalism," Br. for Pet'r at 19, there is more to note. First, in addition to Massachusetts adopting receivership provisions as early as 1855, Mass. Stat., Ch. 124, § 8 (1855), many states had statutory provisions regarding receivership for and the liquidation of insurers long before the enactment of the McCarran-Ferguson Act in 1945.[13] This is reflected in cases such as *Relfe v. Rundle*, 103 U.S. 222 (1881), and *Clark v. Willard*, 292 U.S. 112 (1934), in which insurer receivership provisions have been construed. These cases also reflect how this Court has recognized the longstanding role of the states in conducting insurer receiverships. Br. for Pet'r at 19-20. The NAIC Proceedings demonstrate that states have acted as receivers of insurers at least from the beginnings of the NAIC in

[13] Since 1936, progressively more complete versions of the Model Act have served as a guide for NAIC member states in discharging their duties as rehabilitators and liquidators of insurers. In 1936, the NAIC adopted an early draft version of the Uniform Insurance Liquidation Act, 13 U.L.A. 321 (Master ed. 1986) ("UILA"), as its Model Act. *See* 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 29 (1936).

In 1969 the NAIC adopted the Wisconsin Insurers Rehabilitation and Liquidation Act, Wis. Stat. § 645 (1968), as its model act instead of the UILA. *See* 1 Proc. of the Nat'l Ass'n Ins. Comm'rs 168, 241, 271 (1969). The Wisconsin Statute provides the basis for the current Model Act.

1871, if not earlier. *See* 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 18, 25, 123, 179 (1871).

Second, the states' longstanding practice of chartering or otherwise giving birth to insurers seems to carry with it the need to provide procedures for winding-up the affairs of insurers when their liquidation or burial becomes necessary. In *Fabe*, this Court described the Ohio priority statute as a provision "enacted as part of a complex and specialized administrative structure for the regulation of insurance companies from inception to dissolution." 508 U.S. at 494. In this case, the Court of Appeals declared "[t]he priority that Massachusetts affords to guaranty funds is part and parcel of an integrated regime aimed at protecting policyholders." Br. for Pet'r App. at 11a. The priority and bar date provisions are interdependent parts of a highly integrated regulatory system that truly does regulate insurers from birth to burial. Br. for Pet'r at 20.

Allowing the United States as a claimant to veto the application of claim bar dates – one of the most critical provisions in the complex and specialized administrative regime aimed at protecting policyholders – will result in the entire purpose of such statutes, i.e., the payment of claims, being completely frustrated. This should strike no one as a proper operation of federalism in the insurance regulatory context.

IV. THE STANDARDS AND PRINCIPLES SET OUT IN *FABE* NOW REQUIRE CLARIFICATION

Prior to *Fabe*, state insurance receivers were not sure if they could pay any of the claims against, or even the administrative expenses of, the insurer receivership estates that they were required by state law to administer

without the fear of violating the Federal Priority Act. After *Fabe,* insurance receivers believed they could pay policy related claims without fear of becoming personally liable, or of causing liability to their state by the performance of their statutory duties on behalf of the state, because the general claims of the United States would not take a super-priority above all other claims. The Court of Appeals, by deciding that the United States is not subject to claim bar dates, has resurrected the peril of becoming liable to the United States. This is a compelling case of national interest where this Court can address the apparent confusion in the lower courts in applying the plain meaning of the McCarran-Ferguson Act based on *Fabe.*

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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